82-1469

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARL LOCASCIO, et al.,

Petitioners,

vs.

TELETYPE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NICHOLAS M. SPINA
221 North LaSalle Street
Chicago, Illinois 60601
(312) 236-8743
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED FOR REVIEW

Whether the district court abused its discretion in granting defendant's motion for involuntary dismissal for want of prosecution, pursuant to Rule 41(2)(b) of the Federal Rules of Civil Procedure, where:

1.) The district court was aware that Petitioner was represented by competent counsel during the six (6) months that preceded the court's order of dismissal and that, because such legal representation had been secured, Petitioner was ready, willing and able to go to trial at any time during that period;

2.) Petitioner's counsel, during the aforesaid six month period prior to the dismissal order, made *two* separate motions to set the matter for trial on a certain date;

3.) The district court did not first consider the imposition of lesser sanctions;

4.) The district court failed to balance the interests and conduct of the parties in relation to public policy which favors a trial on the merits; and

5.) The district court failed to conduct an evidentiary hearing on Respondent's motion for involuntary dismissal, thereby improperly precluding Petitioner from an opportunity to rebut Respondent's allegations of prejudice from delay.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, are contained in the caption of the case.

Lorraine A. Amerin
Edward Antonik
Raymond W. Baccus
Stanley C. Black
Walter R. Borchers
Brent D. Braddock
Thomas J. Buckley
Bill R. Cochran
Richard E. Cragg
David Gershberg
William J. Graffy
Adele L. Greb
Walter R. Hajduk
Hubert Hall, Jr.
Alfonso A. Houston
Constantine C. Kokines
William J. Kolberg
Albert G. Komer
Carl Locascio
Frank J. Mortellaro, Jr.
George Mushgrove
Howard S. Pack
Emil R. Pawelczyk
Norbert A. Quick
Rudolph H. Reymann
Mary M. Richardson
William M. Seiwert
Galester Sims
Frank D. Solare
Edwin L. Stipley
John M. Strukl
Jack C. Thompson
Richard J. Walkowicz
S.J. Wojnicki & Thomas F. Zurek

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TELETYPE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Your Petitioner, Carl LoCascio, et al., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals rendered in the above cause, as follows:

OPINIONS IN THE COURT BELOW

The opinion was filed by the United States Court of Appeals for the Seventh Circuit on December 2, 1982. The trial court memorandum opinion and order were entered on February 5, 1982 and are not reported.

Both the appellate opinion and the trial court memorandum and order are contained in the Appendix.

JURISDICTIONAL STATEMENT

A. Judgment Sought To Be Reviewed

The Court of Appeals rendered its opinion, which affirmed the district court's order of involuntary dismissal, on December 2, 1982.

B. Statutory Provision Conferring Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Rule 41(2)(b) Of The Federal Rules Of Civil Procedure

(b) Involuntary Dismissal: Effect Thereof For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

On June 7, 1976, the thirty-five Plaintiffs (hereinafter referred to as Petitioner) filed a Complaint under the Age Discrimination in Employment Act (29 U.S.C. Sec. 921 *et seq.*) in response to their involuntary layoff from their employment with Respondent, TELETYPE CORPORATION, in July of 1975. At the time of the filing of the Complaint, Petitioner's attorney was a Mr. L. Dale Berry of the law firm, Cornfield and Feldman. On June 17, 1977, Mr. Berry moved to withdraw as counsel for Petitioner and, at the hearing on that motion, Judge Prentice Marshall, to whom the matter was assigned for trial on that date, indicated to Petitioner the importance of securing new counsel. Judge Marshall then granted Mr. Berry's motion to withdraw.

In response to this admonishment, the Petitioner, on August 12, 1977, entered into a contractual agreement with attorney L. Louis Karton, which specified that Mr. Karton would provide legal representation for Petitioner, regarding Petitioner's age discrimination suit. However, because Judge Marshall informed Petitioner that Petitioner could have 3 months to secure new counsel, Mr. Karton did not file his appearance as counsel for Petitioner until September 30, 1977. The case then proceeded for the next two years without undue delay. Sometime in 1979, Mr. Karton requested the aid of a younger attorney, a Mr. Steven Carponelli, to help him fulfill the contractual and fiduciary duties owed to Petitioner. Although none of the thirty-five Plaintiffs were ever consulted regarding Mr. Carponelli's representation of them and none agreed to such representation, Mr.

Carponelli filed his appearance as additional trial counsel for Petitioner on June 27, 1979. The deadline for pre-trial discovery was then extended from July 31, 1979 until November 28, 1979. On December 7, 1979, Judge Marshall placed the case on his trial call with a tentative April, 1980 trial date. The trial date then was later reset several times, but the changes were not due to Petitioner's conduct. On October 10, 1980, a tentative trial date of March 16, 1981 was set.

In December, 1980, the case was reassigned to newly-appointed Judge Susan Getzendanner. The first status date before Judge Getzendanner took place on January 5, 1981. At that status hearing, Attorney Carponelli informed the court that the present matter was a 1976 age discrimination case and that the trial would take approximately four to six weeks on the issue of liability alone. Judge Getzendanner then indicated that, although the parties were ready for trial since all the pre-trial discovery materials had been filed on November 28, 1979, her court calendar could not accommodate a trial of the aforementioned length. Because of this, Judge Getzendanner, acting *sua sponte*, struck the March 16, 1981 trial date. Judge Getzendanner then asked if the matter could be settled. In response, Carponelli stated that it was hard to get thirty-five Plaintiffs to agree on anything. Judge Getzendanner then suggested arbitration. She stated:

> "[m]any corporations are moving to arbitration to avoid this backlog problem and if there is some part of the case you can stipulate you will arbitrate, anything to whittle it down."

Attorney Carponelli agreed with this and suggested that both he and Respondent's counsel should discuss this with their clients prior to the next pre-trial conference, which

was scheduled for February 24, 1981. At that pre-trial conference, Judge Getzendanner set a trial date of June 1, 1981.

Sometime prior to the February 4, 1981 pre-trial conference, Attorney Carponelli suggested to the Plaintiffs that they consider arbitration, instead of a jury trial, as a means of settling their claims against respondent. Petitioner immediately rejected such suggestion because of past unsatisfactory experiences with Respondent, regarding the use of arbitration in union activities, and because Petitioner would be giving up its right to a jury trial by choosing arbitration. Since they were aware of the June 1, 1981 trial date, Petitioner then attempted to meet with Attorney Carponelli in order to prepare for trial. However, these numerous attempts were completely rebuffed by Attorney Carponelli. Petitioner then attempted to contact Attorney Karton with the same result. Because of such actions on the part of Mr. Carponelli, and Mr. Karton, Petitioner sent a letter of complaint to Judge Getzendanner, informing her of Carponelli's and Karton's refusal to cooperate with them. The attorney/client relationship continued to deteriorate until April 27, 1981, when Carponelli moved to withdraw his appearance as additional trial counsel for Petitioner. This motion was granted by the trial court. The court then directed that Attorney Karton and Petitioner appear in her chambers on April 30, 1981. Several of the Plaintiffs appeared on that date, but Mr. Karton failed to do so allegedly because he was in Florida due to the illness of his wife. At the April 30, 1981 hearing, Petitioner, CARL LOCASCIO, on behalf of the rest of the Plaintiffs, informed the court that he would attempt to employ new counsel. At that time, he, again on behalf of all the Plaintiffs, for the first time, requested a continuance of the trial date so that he could secure substitute counsel. Judge Getzendanner re-

fused this request and instructed Mr. LoCascio to obtain substitute counsel by May 14, 1981 and to report at a status conference on that date on his success. The court also indicated to the Plaintiffs present that the trial might be delayed one week until June 8, 1981 but that no further delays would be granted.

Mr. Karton failed to attend the status hearing on May 14, 1981. Carl LoCascio, on behalf of the rest of the Plaintiffs, appeared in court and informed Judge Getzendanner that he had contacted three attorneys who each expressed interest in representing Petitioner but who stated that they would need some additional time to become familiar with the matter. This group included Mr. Paul Donnelley of Detroit, a well-known age discrimination lawyer, Mr. Donald Carr of Chicago, and an attorney associated with the Law Firm, Jenner & Block. Mr. LoCascio and several other Plaintiffs traveled to Detroit at their own expense in order to talk to Mr. Donnelley. According to Mr. LoCascio, the three attorneys indicated that it would be unfair to them and to the Petitioner to enter their appearance if a continuance could not be obtained. Judge Getzendanner then again refused to continue the matter. Regarding the prospect of the Plaintiff's representing themselves pro-se, Judge Getzendanner stated:

> "I have a reluctance to conduct a long, complicated trial where the Plaintiffs are not represented by counsel. I think that would not be good for anybody. * * *
>
> I am not going to go to trial with thirty-six scattered Plaintiffs with no counsel. It would be just a waste of everybody's time."

Judge Getzendanner then struck the trial date and requested a motion for involuntary dismissal from Re-

spondent's counsel. She then set a briefing schedule for that motion.

Mr. LoCascio then protested that it was not the Plaintiffs' fault that the attorney of record did not show up on the scheduled date. In response the court stated:

> "[Y]ou had two sets of lawyers withdraw and I can tell you plainly that is because they don't perceive you have a very good case. They don't want to come in here six weeks and try this case. They want to settle the case but your demands are too high."

Mr. LoCascio then protested that Mr. Karton was not honoring his contractual agreement to represent them. The court then stated:

> "[S]o sue him. You know, what can I do? It is a 1976 case. It is set for trial. We can't go to trial."

Regarding the question of getting a new attorney for Plaintiffs, the court then stated:

> "[Y]es, but I told you to bring me a warm body and let me look him in the eye and talk with him and see what his commitment would be and then I would consider a delay."

Mr. LoCascio then reasserted his request that Plaintiffs be given a continuance. The trial court again refused this request and told Mr. LoCascio to have his new lawyer come before her.

In response to Judge Getzendanner's suggestion that they sue Mr. Karton, the Petitioner, subsequent to the status hearing on May 14, 1982, filed a complaint against Mr. Karton with the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court. On May 15, 1981 and again on May 19, 1981, Mr. LoCascio called Mr. Karton and inquired as to what he was going to do with their case. Mr. Karton refused to respond to any of

Mr. LoCascio's inquiries. On May 27, 1981, Mr. LoCascio filed a two-page answer to Respondent's motion to dismiss in which he contended that Petitioner's situation had been caused by the improper representation of retained counsels. On June 2, 1981, Attorney Karton filed a motion for withdrawal as Petitioner's attorney. On June 8, 1981, Judge Getzendanner held another status hearing on the case. At that hearing, twenty-one of the thirty-six Plaintiffs were present when Judge Getzendanner took Attorney Karton's motion under consideration. However, the court initially stated:

> "[t]here is no question Mr. Karton is still of record in this case and he is responsible to the court and if I set the case, he is responsible to either appear or to make sure someone appears in his stead. So that's what we mean when we say counsel of record. He has filed an appearance."

Mr. Karton then objected to his continuing to represent Petitioner since Mr. LoCascio had filed an answer to the motion to dismiss and had also filed a complaint against him at the Attorney Registration and Disciplinary Commission. Regarding Petitioner's attempts to secure new legal counsel, Mr. LoCascio then stated:

> "Your Honor, we have asked for legal assistance and they are willing to cooperate but they feel that as long as Mr. Karton was, * * * [and still is the] attorney of record, we haven't been able to act as not having an attorney."

In response, Judge Getzendanner stated:

> "[t]hen my order will specifically state that although the motion is taken under advisement, because I do want to look at the precedents, Mr. Karton has no further responsibilities in this case. So that will free you up to go out and get another lawyer."

During this argument, Attorney Ernest Rossiello happened to be in the courtroom on another age discrimination case (*Sohm v. Globe Life Insurance Company*, No. 78 C 4088). After the hearing, he telephoned Mr. Karton and suggested a meeting with some of the Plaintiffs to discuss his undertaking the matter. Beginning on June 18, 1981, Mr. Rossiello filed his appearance for a number of the Plaintiffs.

On July 8, 1981, Mr. Rossiello filed a motion to set the cause for trial. However, this motion was denied due to Mr. Rossiello's failure to appear at the motion call at 10:00 a.m. However, Rossiello asserted that on the date in question he called the court's minute clerk at approximately 9:25 a.m. to advise that he had a previous motion in another courtroom. Mr. Rossiello then arrived for the present matter before Judge Getzendanner at 10:15 a.m. Neither the court nor Respondent's attorneys waited the extra fifteen minutes for him to appear. On July 13, 1981, Mr. Rossiello reasserted his motion to set the cause for trial. At that hearing, the trial court took Mr. Rossiello's motion under advisement, pending its decision on the motion to dismiss. However, the court also expressed interest in obtaining written verification that the Plaintiffs had, at that time, obtained legal representation willing to devote time to a trial and its preparation. Judge Getzendanner also informed Mr. Rossiello that she would give him time to file a memorandum in response to Respondent's motion to dismiss. Mr. Rossiello then argued that the Respondent's motion to dismiss was moot since he was ready to try the case. In response, the court stated:

> "Oh, I don't think its moot at all. Your telling me now that I've got a 1976 case that I set for trial in June—a firm trial date in June—and Plaintiff's

> terminated their lawyers on the eve of that trial now your telling me I've got to reschedule a month of trial time. It's a terrible burden on me."

The court then stated that Respondents were interested and entitled to a trial of the case. Mr. Rossiello agreed and stated that the Plaintiffs were also entitled to a trial. The court then stated:

> "You don't understand—the case has been set for trial three times and Plaintiffs have failed to go forward."

On August 3, 1981, Mr. Rossiello filed an answer to the motion to dismiss setting forth his willingness and ability to try the case.

On December 23, 1981, the trial court ordered the Respondent to submit an affidavit in support of its contention that it had been prejudiced from the delay because many of its witnesses had retired and left the state and because others had become gravely ill or died. The court requested that the affidavit identify the individuals and indicate the relevance of their testimony. On January 29, 1982, Respondent filed the affidavit of a James M. Staulcup, Jr. in response to that order. However, that affidavit failed to identify, with particularity, the witnesses and what their testimony would be. On February 5, 1982, petitioner moved for a more specific affidavit as to the alleged unavailability of witnesses. Nonetheless, on the same date, Judge Getzendanner, by written opinion, granted Respondent's motion for involuntary dismissal and denied Petitioner's motion for a more specific affidavit.

REASONS FOR GRANTING THE WRIT

The order of the district court, granting Respondent's motion for involuntary dismissal, should be reversed since the court abused its discretion in entering such dismissal.

It is within the discretion of the trial court to dismiss a case for failure to prosecute either on the Defendant's motion or *sua sponte*. (*Link v. Wabash Railroad Co.* (1962), 370 U.S. 626, 629-631.) A court of review will not disturb a decision to dismiss for failure to prosecute in the absence of an abuse of discretion or in the absence of evidence indicating that the court relied upon erroneous conclusions of law in reaching its decision. (See *Jafree v. Scott* (7th Cir. 1978), 590 F. 2d 209, 212.) In the present matter, the trial court clearly abused its discretion in granting Respondent's motion for involuntary dismissal.

The reason for such discretionary power is that district courts must have the power to keep court calendars free from congestion and to protect Defendants from a Plaintiff's contumacious conduct resulting in prejudicial delay. (*Link v. Wabash Railroad Co.*) However, public policy favors a full trial on the merits. (*Reizakis v. Loy* (4th Cir. 1974), 490 F. 2d 1132.) Consequently, dismissal of a Plaintiff's case, which constitutes a complete deprivation of that party's right to a trial on the merits, is considered the most harsh sanction and should only be used in extreme circumstances. (*Gonzalez v. Firestone Tire & Rubber Co.* (5th Cir. 1980), 610 F. 2d 241.)

In determining whether to dismiss a case for failure to prosecute, the trial court must examine that particular case's procedural history and the situation apparent at the time of dismissal. (*Sloup v. Hershey* (7th Cir. 1971), 457 F. 2d 148.) In this regard, it has been held that an earlier lack of diligence is not grounds for dismissal when the Plaintiff is currently displaying diligence. (*Marks v. San Francisco Real Estate Board* (9th Cir. 1980), 627 F. 2d 947.)

Moreover, it is well established that circumstances extreme enough to warrant dismissal are generally those in which the imposition of lesser sanctions has been or would be ineffective. (*Silas v. Sears, Roebuck & Co.* (5th Cir. 1978), 586 F. 2d 382.)

In its memorandum opinion, the district court delineated the primary issue as:

> "whether Plaintiffs have been dilatory in obtaining substitute counsel and if so, whether this conscious neglect on their part justifies dismissal."

The court of appeals in its opinion indicated that the only serious procrastination on the part of Petitioner prior to 1981 "was a three-month failure to secure new counsel when Plaintiff's first attorney withdrew ten days after filing the lawsuit on July 17, 1977." The court went on to state that Petitioner's failure to secure new counsel for the aforesaid period could be interpreted as evidence of a lack of prosecutive intent and that in determining the likely outcome of later withdrawals by Petitioner's attorneys, the trial court could have reasonably believed that a pattern of dilatory conduct was being played out. However, contrary to the court of appeals' assertions, the complaint in this matter was filed on June 7, 1976 by Attorney Berry. Attorney Berry withdrew from the case on June 17, 1977 because Petitioner's original agreement

with Mr. Berry for compensation was based on a contingency fee basis and Petitioner would not agree to any other form of compensation. As the court of appeals stated, dismissal of Petitioner's first attorney for this reason cannot be considered dilatory behavior. In addition, Petitioner signed a contract for legal representation with Petitioner's second attorney, Louis Karton, on August 12, 1977—less than two months after Attorney Berry withdrew from the case. However, because Judge Marshall told Petitioner that Petitioner could have 3 months to secure new counsel, Mr. Karton did not file his appearance on Petitioner's behalf until September 30, 1977. Under such circumstances, it is evident that the three-month delay between the withdrawal of Attorney Berry and the filing of Louis Karton's appearance cannot be characterized as serious procrastination on the part of Petitioner or evidence of Petitioner's lack of prosecutive intent.

After filing his appearance, Mr. Karton, rather than Petitioner, retained Mr. Carponelli to aid him in the trial of this matter. Mr. Carponelli entered his appearance as additional trial counsel on June 27, 1979. Since Petitioner did not request the services of Mr. Carponelli or approve his representation, his later withdrawal on April 27, 1981 cannot constitute dilatory conduct on the part of Petitioner. Moreover, as outlined in the statement of facts, Mr. Carponelli attempted to persuade Petitioner to submit the matter to arbitration rather than going to trial before a jury. Petitioner immediately rejected this suggestion because of past, unsatisfactory experiences with Respondent regarding arbitration. Once this suggestion was rejected, Mr. Carponelli refused to have anything to do with Petitioner. Several of the Plaintiffs attempted to contact Carponelli in order to prepare for trial, which

they were aware had been set for June 1, 1981, but their attempts were completely rebuffed. In light of such facts, Mr. Carponelli's withdrawal as trial counsel on April 27, 1981, certainly does not constitute dilatory conduct on the part of Petitioner.

The court directed Mr. Karton and the Plaintiffs to appear in her chambers on April 30, 1981. The Plaintiffs appeared, but Mr. Karton did not apparently because he was required to be in Florida due to his wife's illness. Because Mr. Karton was unavailable, the Plaintiffs requested a continuance of the June 1, 1981 trial date so that they could obtain substitute counsel. This request was the first trial date continuance requested by Petitioner. The court refused the continuance request and ordered Plaintiffs to appear with new counsel on May 14, 1981. At that hearing Mr. LoCascio, a Plaintiff speaking on behalf of the group of Plaintiffs, reminded Judge Getzendanner of Plaintiff's contractual agreement with Mr. Karton to represent them. Judge Getzendanner then responded, "[S]o sue him." At the end of this hearing, in response to Judge Getzendanner's suggestion, the Plaintiffs went in a group to the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court and filed a complaint against Mr. Karton. It is evident that the family illness which required Mr. Karton's presence in Florida was not the fault of Petitioner. Mr. Karton was obligated under his contractual agreement with Petitioner to either represent them or provide substitute counsel. This he did not do. Given this fact and the suggestion of Judge Getzendanner to sue Mr. Karton, Petitioner's act of filing a complaint against Mr. Karton at the Attorney Registration and Disciplinary Commission cannot be construed to be dilatory conduct on the part of Petitioner.

Further evidence of Petitioner's willingness to go to trial is the fact that on two occasions, May 15 and May 19, 1981, Mr. LoCascio contacted Mr. Karton in order to find out whether he was going to represent them or withdraw from the case. Mr. Karton refused to respond to these inquiries. Plaintiffs' readiness to proceed is also evidenced by the fact that they contacted three new attorneys in the hope of securing new representation prior to May 14, 1981. Among this group, was Mr. Paul Donnelley, a noted age discrimination lawyer from Detroit. Several Plaintiffs, including Mr. LoCascio, travelled to Detroit at their own expense to talk to Mr. Donnelley prior to May 14, 1981. However, Mr. Donnelley and the other two attorneys contacted stated that they would take the case only if Petitioner was able to secure a continuance since three weeks was too short of a time to adequately prepare the case for trial. The attorneys were also reluctant to take the case as long as Mr. Karton was the attorney of record. As indicated in the statement of facts, Mr. Karton was the attorney of record until June 8, 1981. The effort on the part of Petitioner to secure additional counsel, especially undertaking the expense to fly to Detroit to interview Mr. Donnelley, indicates that they were trying their best to comply with the court's order to secure new counsel. Under such circumstances and in view of the fact that the court would not grant a continuance, the fact that Petitioner had not retained substitute counsel on May 14, 1981 cannot be construed to be dilatory conduct on Petitioner's part.

The trial court's refusal of Petitioner's request for a continuance of the trial date and its order to obtain new counsel in a period of two weeks were unreasonable. The court indicated that she knew Petitioner would encounter difficulty in obtaining substitute counsel. In the memo-

randum opinion, the court stated that it doubted that new counsel could be found because a long trial of six weeks was predicted. It is evident that no attorney would be willing to try a thirty-five Plaintiff age discrimination case with a predicted six week trial period if allowed only three weeks to prepare. Contrary to the district court's assertion in the memorandum opinion, after refusing to continue the trial date, the court, itself, requested Respondent's motion for involuntary dismissal. Rather than striking the trial date and taking Respondent's motion for involuntary dismissal, the court should have granted the continuance or required Mr. Karton to try the case on June 8, 1981. This is especially true in light of the fact that the judge did not want to allow the 35 plaintiffs to proceed *pro se* in an age discrimination case.

If it had continued the case, the court could have referred Petitioner to the Chicago Bar Association Lawyer Reference Program or appointed an attorney for them from the list of lawyers on file in the district court's clerk's office. Moreover, Mr. Karton's motion to withdraw on June 2, 1981, was opposed by twenty-one Plaintiffs who appeared on June 8, 1981. Nevertheless, the trial court took his motion to withdraw under consideration along with Respondent's motion for involuntary dismissal. The court then told Mr. Karton that he would have no further responsibility as to the Petitioner even though he would remain the attorney of record.

In both *Sanden v. Mayo Clinic* (8th Cir. 1974), 495 F. 2d 221 and *Butterman v. Walston & Co.* (7th Cir. 1967), 387 F. 2d 822, the trial court refused to continue the trial date but required counsel of record to proceed with trial. Although the court's refusal to continue the trial date was held not to be an abuse of discretion, the Plaintiffs were afforded a trial on the merits. In the present matter,

Petitioner was denied a right to trial on the merits when the trial court refused to grant a continuance and also refused to hold Mr. Karton responsible for trial even though Petitioner, by that time, had paid him approximately $19,000.00 in attorney's fees. The court released Mr. Karton from his contractual obligations to provide Petitioner with legal representation because the court felt that Petitioner was aware, for years, that Mr. Karton would not be Petitioner's trial counsel because of his age and physical infirmity. However, we must point out that the Plaintiffs are laymen and not attorneys. They are not aware of the physical demands made upon an attorney during a lengthy trial. Not having been told to the contrary and not seeing any evidence of physical infirmity when they hired him, the Plaintiffs were under the impression that, when Mr. Carponelli withdrew, Mr. Karton would handle the trial of their case. Mr. Karton was hired to represent Petitioner in August of 1977. After most of the discovery had been completed, Mr. Karton engaged Mr. Carponelli in order to aid him in carrying out his responsibility to Petitioner. Since Petitioner never hired Mr. Carponelli or approved of his legal representation, Mr. Carponelli's withdrawal from the case obviously did not alter Mr. Karton's legal obligations to Petitioner. Furthermore, we must call attention to the fact that ten days after Mr. Karton filed his motion to withdraw, Mr. Rossiello began to file his appearances for Plaintiffs. In view of such facts, the district court's holding that Petitioner's dilatory conduct in obtaining substitute counsel constituted conscious neglect was not supported by the manifest weight of the evidence.

In its memorandum opinion, the district court indicated that the fact that Plaintiffs were represented by an attorney subsequent to Respondent's motion for dismissal

did not cure the problem created by their failure to obtain counsel in the face of a firm trial date. However, the Seventh Circuit, itself, has indicated that when faced with the possibility of dismissing a case for failure to prosecute, the trial court must examine the case's own procedural history and the situation at the time of the dismissal. (See *Sloup v. Hershey (supra)* and *Sandee Mfg. Co. v. Rohm & Haas Co.* (7th Cir. 1962), 298 F. 2d 41, 43.) In this regard, Mr. Rossiello filed an answer setting forth his willingness and ability to try this matter. Since all pre-trial materials had been previously filed on November 28, 1979, Mr. Rossiello filed a motion to set a trial date on July 8, 1981 and again on July 13, 1981. These actions demonstrated Petitioner's willingness and eagerness to proceed to trial. (See *Marks v. San Francisco Real Estate Board (supra)* where Plaintiff's request for a pretrial conference was held to demonstrate Plaintiff's eagerness to proceed to trial. (627 F. 2d 947, 948.))

In its memorandum opinion, the district court indicated that Petitioner had gone through numerous legal counsel which they had voluntarily selected. The court concluded that, under these circumstances, the involuntary dismissal would not unfairly punish Petitioner for the acts of Petitioner's counsel. However, the facts are contrary to the district court's assertions. Petitioner terminated only one attorney whom Petitioner had voluntarily selected and that was Mr. Berry, whose withdrawal over compensation in 1977 caused a very short delay. Petitioner's case then proceeded without undue delay for several years until the time Mr. Carponelli motioned to withdraw from the case approximately one month prior to the trial date set by Judge Getzendanner. Mr. Carponelli was never voluntarily selected by the Plaintiffs to represent them on the scheduled trial date.

The court then relieved Mr. Karton of his contractual obligations to Petitioner over Petitioner's objections. At the time the trial court dismissed Petitioner's case, Petitioner was represented by Mr. Rossiello. As stated above, the pre-trial materials had already been filed and Mr. Rossiello had presented two motions to obtain a trial date. Only the actual trial on the merits remained as unfinished business. Under such circumstances, the trial court's decision to involuntarily dismiss Petitioner's case was an abuse of discretion.

As indicated above, circumstances extreme enough to warrant dismissal are generally those in which the imposition of lesser sanctions has been or would be ineffective. (See *Silas v. Sears, Roebuck & Co. (supra).*) In determining the appropriate sanction to impose upon a Plaintiff for conduct which occasioned a delay in the litigation of his claim, a trial court should consider (1) the actual prejudice suffered by the Defendant (*Citizens Utilities Co. v. American Telephone & Telegraph Co.* (9th Cir. 1979), 595 F. 2d 1171) and (2) whether Plaintiff's conduct was contumacious or in furtherance of a plan to deliberately delay the litigation. (*Gonzalez v. Firestone Tire & Rubber Co., (supra).*) Moreover, although the law presumes prejudice to a Defendant from unreasonable delays, that presumption is rebuttable. (See *Citizens Utilities Co. v. American Telephone & Telegraph Co., (supra).*) In deciding a Defendant's motion to dismiss, the trial court should balance the actual prejudice suffered by Defendant and the nature of Plaintiff's conduct against public policy favoring a trial on the merits. (*Moore v. St. Louis Music Supply Company, Inc.* (8th Cir. 1976), 539 F. 2d 1191.) In addition, in the absence of contumacious conduct or a clear record of repetitious or purposeful delay, inconvenience to a Defendant from a

case's age does not warrant dismissal, especially when the Plaintiff was, at the time of dismissal, displaying diligence. *Marks v. San Francisco Real Estate Board, (supra.)*

The trial court improperly failed to determine whether Defendant was prejudiced in actuality by Petitioner's failure to be represented by an attorney who was willing to try the case on the June trial date set by the court. On December 23, 1981, the trial court ordered Respondent to submit an affidavit in support of its assertion that it had been prejudiced from the delay in that "many of the Defendant's witnesses have retired and left the states. Others have become gravely ill or died." In response, Respondent, on January 29, 1982, filed the affidavit of James Staulcup which failed to identify the witnesses and their proposed testimony with particularity. On February 5, 1982, Petitioner filed a motion for a more specific affidavit of the alleged unavailability of witnesses. However, on the same date, the trial court, without an evidentiary hearing, granted Respondent's motion for involuntary dismissal and denied Petitioner's motion for a more specific affidavit. Accordingly, Petitioner was denied the opportunity to rebut Respondent's contention that it suffered prejudice from the failure of the case to proceed to trial on the set trial date.

In addition, a careful review of the record will reveal that there is no evidence of contumacious conduct or deliberate delay on the part of Petitioner. On any given hearing date, a representative of the Plaintiffs appeared in court along with their counsel. On June 8, 1981, the court acknowledged the presence of twenty-one Plaintiffs. On May 14, 1981, the trial court during a status hearing, indicated that it was aware that it was not the Petitioner's fault that Mr. Karton was in Florida because of family illness. Where Plaintiffs show indiffer-

ent or dilatory practices, delays should be arrested by the imposition of sanctions bearing ramifications less devastating than those borne by dismissal. *Moore v. St. Louis Music Supply Company, Inc. (supra.)*

It is very apparent that the district court could have easily imposed upon Petitioner a sanction which was less severe than involuntary dismissal. As stated above, the trial court could have required Mr. Karton, the attorney of record, to try the case on June 8, 1981. In the alternative, the court could have granted Petitioner the necessary continuance to allow substitute counsel time to prepare the case accompanied by an order requiring that the case be ready for trial on that date. The court also could have referred Petitioner to the Chicago Bar Association Lawyer Reference Program or appointed an attorney for them from the list of lawyers on file in the district court clerk's office. Furthermore, the court could have allowed the Plaintiffs to proceed *pro se.* Even after the court struck the June 8, 1981 trial date, the court could have rescheduled the trial date since Mr. Rossiello and Petitioner were ready, willing and able to try the case.

In *Schenck v. Baer, Sterns & Co.* (2d Cir. 1978), 583 F. 2d 58, Plaintiffs filed a complaint on December 3, 1976. Plaintiffs took no more subsequent action on their case and it was dismissed for lack of prosecution on January 13, 1978. On the date the order of dismissal was entered, new counsel appeared for the Plaintiffs at a status hearing and expressed his willingness to try the case. Nonetheless, the court dismissed the matter. The court of appeals for the second district held that the dismissal was an abuse of discretion and indicated that a lesser sanction, such as an order requiring Plaintiff to have their case ready for trial, would have been more than adequate. In the present matter, it is evident that, at the very

least, the 35 Plaintiffs were ready to try their case for over six months prior to the district court's order of dismissal. Under such circumstances, the imposition of such a severe sanction was an abuse of discretion.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

NICHOLAS M. SPINA
221 North LaSalle Street
Chicago, Illinois 60601
(312) 236-8743
Attorney for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-1354

CARL LOCASCIO, et al.,

Plaintiffs-Appellants,

v.

TELETYPE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-2087—**Susan Getzendanner**, *Judge.*

ARGUED SEPTEMBER 13, 1982—DECIDED DECEMBER 2, 1982

Before WOOD and POSNER, *Circuit Judges*, and DUMBAULD, *Senior District Judge.**

WOOD, *Circuit Judge.* This case was brought under the Age Discrimination in Employment Act, Title 29 U.S.C. § 921 *et seq.*, by 35 former employees of Teletype Corporation in response to their lay-offs in July of 1975. It is in this court on appeal from an involuntary dismissal for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure. The plaintiffs-appellants, Carl Locascio, et al., request that the dismissal be vacated and

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

the case be remanded to the district court for trial because they contend that the trial judge abused her discretion in granting the motion to dismiss. We reject plaintiffs' contention and affirm the dismissal.

I.

It is unclear from the record at what point in the progress of this lawsuit that the delays leading directly to its dismissal actually began. While it appears that the critical time period fell between February and June of 1981, the lawsuit was already almost four years old at that time, and had encountered delays attributable to both parties and to the court prior to 1981. The most significant of those for which the plaintiffs were responsible was a three-month failure to secure new counsel when plaintiffs' first attorney withdrew ten days after filing the lawsuit on July 17, 1977.[1] There was no other single instance of serious procrastination until 1981, but it cannot be said that plaintiffs facilitated expeditious movement toward trial.

In early 1981, plaintiffs' trial attorney suggested to plaintiffs that they consider arbitration instead of jury trial. Plaintiffs met this suggestion with disapproval manifested in letters of complaint to the trial judge. A progressive deterioration in the attorney/client relationship, evidenced in part by these communications, eventually resulted in trial counsel's withdrawal on April 27, 1981. At that time, and in an in-chambers conference

[1] There is nothing in the record to indicate that this dismissal was due to anything but a misunderstanding over compensation. However, while in itself dismissal of counsel cannot in this instance be considered "dilatory" behavior, plaintiffs' failure to secure new counsel for three months could be interpreted as evidence of a lack of prosecutive intent. In determining the likely outcome of later withdrawals by plaintiffs' attorneys, the trial court could reasonably believe that a pattern of dilatory conduct was being played out, and it was within her discretion to forestall the adverse effects on both her docket and defendants of such apparently remiss behavior.

on April 30, plaintiffs indicated to the judge their dissatisfaction with their remaining attorney. Judge Getzendanner advised them that the June 1 trial date could be delayed for no more than one week, until June 8, and that no further delays would be granted. At that time she also set a May 14 status conference at which plaintiffs were to appear with new counsel. Plaintiffs not only failed to secure new trial counsel during that two-week period, but also filed a complaint against their remaining counsel before the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court, resulting in counsel's motion to withdraw from the case. It was at this point that defendants filed a motion for involuntary dismissal. Subsequent events did little to salvage the situation: plaintiffs gave no indication of further efforts to secure trial counsel or that they wished to proceed *pro se*; and finally, the attorney who serendipitously stepped in at the *twelfth* hour to attempt to save plaintiffs from certain dismissal failed to appear in time for his own motion call to set a new trial date.

II.

It is within the discretion of the trial court to dismiss for failure to prosecute, *Link v. Wabash*, 370 U.S. 626, 629-31 (1962), and we will not disturb such a ruling in the absence of abuse of discretion. *Jafree v. Scott*, 590 F.2d 209, 212 (7th Cir. 1978). While there are no clear-cut rules governing the exercise of discretion on a motion to dismiss for failure to prosecute, this circuit has adhered to a standard which looks to the question of arbitrariness on the part of the trial court in determining whether there is an abuse of discretion warranting reversal. *Link*. In general we will not set aside a trial court's discretionary order unless it is clear that no reasonable person could concur in the trial court's assessment of the issue under consideration. *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973) (adopting the standards set forth in *Particle Data Laboratories, Inc. v. Coulter Electronics, Inc.*, 420 F.2d 1174, 1178 (7th Cir. 1969), governing appellate review of actions within a trial court's discretion).

The instant case is a close and difficult one, due to the number of plaintiffs involved, external factors such as the congestion of the trial court's docket, and the severity of the sanction imposed. The interests of justice require that the use of such an extreme and final solution as dismissal with prejudice be held in abeyance until it is clear that lesser sanctions either have not been or will not be effective to remedy the dilatory conduct. However, this court cannot substitute its judgment for that of the trial court simply because it might have acted differently in the trial judge's place. The record indicates a lack of prosecutive intent on plaintiffs' part in their inability to secure and retain counsel whom they were willing to allow to effectively prosecute their action, and in their failure to demonstrate to the satisfaction of the trial court that they had been and were continuing to make a concerted good faith effort to obtain an attorney to represent them at trial. Judge Getzendanner warned them of the drastic consequences that would ensue should they fail to secure a replacement for their trial attorney; yet two weeks before trial plaintiffs had not only failed in that respect, but had taken actions to cause their remaining attorney to withdraw from their case. The lawyer who finally stepped into the case on what was to have been the trial date did so at his own initiative through no expenditure of effort on the part of the plaintiffs that might have indicated their intent to prosecute their action. Past conduct of the plaintiffs justified the court's mounting frustration and eventual dismissal of the case.

For these reasons the order of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARL LOCASCIO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	76 C 2087
	)	
TELETYPE CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

Defendant's motion to dismiss for failure to prosecute is granted. The facts that have persuaded this court to exercise its discretion to dismiss are as follows:

Plaintiffs filed their initial complaint on June 7, 1976. At that time, their attorney was a Mr. Berry.

On June 17, 1977, Mr. Berry moved to withdraw as counsel for plaintiffs. At the hearing on the motion, Judge Marshall, to whom the case was assigned at the time, stressed to plaintiffs the importance of securing new counsel and expressed his reluctance to permit withdrawal in the absence of substitute counsel. Nevertheless, Judge Marshall granted the motion to withdraw.

Over three months passed before plaintiffs obtained new counsel. On September 30, 1977, Mr. Karton filed his appearance. The case proceeded for two years without undue dilatoriness, although the discovery cutoff date was extended for three months on plaintiffs' motion and defendant argues that there were problems scheduling the 36 plaintiffs' depositions.

On June 27, 1979, Mr. Carponelli entered his appearance as trial counsel for plaintiffs. At this point it became clear that Mr. Karton would not try the case. The deadline for filing pretrial materials was extended from July 31 to August 31, 1979, and then until November 28, 1979.

On December 7, 1979, Judge Marshall placed the case on his trial call, with a tentative April, 1980, trial date, which was later reset several times until March 16, 1981.

In December, 1981, however, the case was reassigned to this court. The March trial date was stricken and a pretrial conference was scheduled for February 24th. At the conference, the court set a firm trial date of June 1, 1981.

Plaintiffs' relationship with Mr. Carponelli began to deteriorate and on April 27, 1981, Mr. Carponelli moved to withdraw. The court granted this motion but held plaintiffs to the June trial date.

At an in-chambers conference on April 30, 1981, plaintiff Locascio, on behalf of all plaintiffs, told the court that new counsel would be employed. The court firmly advised the plaintiffs that the case must proceed to trial as scheduled and that they must employ new counsel in time for him or her to prepare for trial. The court stated that the trial might be delayed one week, until June 8th, but that no further delays would be granted.

The court was firm in admonishing the plaintiffs because I had formed the impression that plaintiffs' inability to get along with trial counsel was the basic disagreement between clients and counsel as to the value and merits of the plaintiffs' case. Trial counsel had urged settlement and the plaintiffs had rejected settlement. Although Mr. Carponelli informed the court that he was ready and able to proceed to trial, the plaintiffs chose to dismiss him and seek new counsel. The court doubted that new counsel could be found because a long trial was predicted (6 weeks) and if plaintiffs' trial counsel's assessment of the case was correct, it would be a case difficult

to win. Mr. Locascio disagreed with the court and predicted that he would be able to find new counsel willing and able to take the case. Mr. Locascio asked for a continuance but the court stated that the trial date was firm. Later the court set the trial date back one week, to June 8, 1981.

Mr. Locascio was told to employ new counsel by May 14, 1981 and to report at a status conference on his success. At this time the plaintiffs had two weeks to find new counsel and new counsel would have had three weeks to prepare the case for trial. There was no question that a new lawyer who devoted substantial time to the case easily could have prepared it for trial during the time allotted by the court.

On May 14, 1981, plaintiff Locascio reported that plaintiffs had contacted several lawyers but they had failed to retain another attorney. In response, defendant filed its motion for involuntary dismissal. The court struck the June trial date and set a briefing schedule on the motion to dismiss.

On May 27, 1981, plaintiff Locascio, apparently acting again on behalf of all plaintiffs, filed a two-page answer to the motion, blaming their "predicament" on all of the attorneys. As of this date, plaintiffs still had not obtained new counsel.

At the beginning of June, at a status hearing in this case, the court took Mr. Karton's motion to withdraw under advisement, pending decision on the motion to dismiss, but relieved Mr. Karton of any further responsibilities in the case.

At this status hearing, Mr. Rossiello, an attorney who was before the court on another matter, became interested in this case. In his own words, "[a]s a friend of the court, he took it upon himself to offer her services to Mr. L. Louis Karton in obtaining adequate substitute counsel," namely, himself. Beginning on June 18th, Mr. Rossiello filed his appearances for a number of the plaintiffs.

On July 8, 1981, Mr. Rossiello filed a motion to set the cause for trial, which was denied due to counsel's failure to appear at the motion call.*

The motion was renoticed for July 13th, and the court took it under advisement, pending decision on the motion to dismiss. The court also granted Mr. Rossiello leave to file an answering memorandum to the motion to dismiss and defendant leave to file a reply.

The substance of plaintiffs' memorandum is that the motion to dismiss is moot "because plaintiffs have now finally obtained competent counsel eager to try this case to a jury." However, "[plaintiffs] cannot use [their] actions under the motion to dismiss was filed as evidence of [their] diligence in prosecuting the suit." *Fidelity Philadelphia Trust Co. v. Pioche Mines Consolidated, Inc.*, 587 F.2d 27, 29 (9th Cir. 1978). That plaintiffs are now represented by an attorney does not cure the problem created by their failure to obtain counsel in the face of a firm trial date.

Given this procedural history, the court must now consider whether plaintiffs have been dilatory in obtaining substitute counsel, and if so, whether this conscious

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* Counsel's excuse for failing to appear is contained in his second motion:

> This motion was to be heard on July 8, 1981 at 10:00 a.m., but was denied. Plaintiffs' attorney had called the court's minute clerk earlier that morning at about 9:25 a.m. to advise that he had a previous motion before Judge Flaum in case No. 80 C 0793, *Digital v. Comsi.* Counsel for the plaintiffs arrived for the Teletype motion at 10:15 a.m., but neither the court nor defendant's attorneys waited the extra few minutes for him to appear. Hence, this motion is repeated.

The court notes that counsel should have been aware of the scheduling conflict that he himself had created prior to 9:25 a.m. on the morning his motions were to be heard. Moreover, the court notes that counsel chose to give priority to a 1980 case rather than the instant case in which counsel knew plaintiffs already risked dismissal for failure to prosecute.

neglect on their part justifies dismissal. The court concludes that they have reasonably delayed the prosecution of their case and that this does justify dismissal.

It is clear that in an appropriate case the failure to obtain new counsel may justify dismissal. In *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973), plaintiffs' attorney petitioned to withdraw on March 12th and attached to the petition a copy of a letter to plaintiff dated January 12th advising him of the attorney's intent to withdraw. The district court granted the petition on April 6th and sent plaintiff a copy of the order by certified mail. Plaintiff then failed to appear at a pretrial conference on April 30th and the court dismissed his complaint for failure to prosecute, again sending a copy of the order to plaintiff by certified mail. "Thereafter the courthouse door was not darkened by Beshear, either personally or by counsel, until May 24, 1971, the date on which the case was listed on the court's calendar for trial," *id.* at 129-30, when his new attorney filed a motion for relief from the dismissal. The Seventh Circuit held that there was no abuse of discretion in the dismissal.

In *Beshear*, the plaintiff at the time of the dismissal had known for three and a half months that he might have to get a new attorney and for nearly a month that he would in fact have to do so. Yet he did nothing for nearly another month. This delay in obtaining counsel, along with his failure to appear at the pretrial conference, was held sufficient to justify dismissal.

Here, plaintiffs have changed counsel not once, but three times. Moreover, as of February of last year they suspected they were going to have to obtain new trial counsel by June 1st, and by the end of April, they knew this for a fact. Yet plaintiffs never found new counsel, and were it not for Mr. Rossiello's fortuitous presence in court on June 4th, plaintiffs might still be without counsel. This conduct indicates a lack of prosecutive intent.

Also similar to the instant case is *Hernandez v. United States*, 465 F.Supp. 1071 (D. Kan. 1979). In *Hernandez*, plaintiff's third attorney withdrew on March 14, 1977,

and plaintiff did not obtain a replacement until August 22nd. At that time, the court overruled defendant's motion to dismiss for lack of prosecution, in what the court characterized as "an abundance of caution." *Id.* at 1075. Subsequently, plaintiff failed to comply with the court's orders regarding pretrial materials, and on November 9, 1978, plaintiff's fourth attorney moved to withdraw. The court ordered plaintiff to "act with dispatch" in securing new counsel, but he had not done so as of the court's decision.

In granting a second motion to dismiss for failure to prosecute, the court stated:

> It is clear that dismissal does not unfairly punish plaintiff for the acts of his counsel. By terminating four counsel, plaintiff himself has accounted for much of the delay in this case. Twice, plaintiff has appeared at hearings asking for delays so that he could obtain counsel, even though he had known for two or three months that he was unrepresented. Further, plaintiff has voluntarily selected the attorneys for whose conduct he now complains . . . .

Id. These same observations are equally applicable in the present case.

In summary, the court concludes that plaintiffs' frequent changes in counsel and their delay, knowing that the case was set for trial, in obtaining new trial counsel, which delay resulted in the trial date's being stricken, justifies dismissal of their complaint. Accordingly, the court grants defendant's motion to dismiss for lack of prosecution. The other pending motions are denied as moot.

/s/ SUSAN GETZENDANNER

February 5, 1982

No. 82-1469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARL LOCASCIO, et al.,

Petitioners,

v.

TELETYPE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GERALD D. SKONING
Counsel of Record
WALTER P. LOOMIS, JR.
CARL E. JOHNSON
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000
Attorneys for Respondent

Dated: April 4, 1983

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly concluded that the district court did not abuse its discretion when, on the basis of the record before it, it granted Respondent's motion for involuntary dismissal for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.

PARTIES

Petitioners are thirty-five individuals, formerly employees of Respondent, who were plaintiffs in the district court and appellants in the court of appeals.[1]

Respondent Teletype Corporation is a wholly owned subsidiary of Western Electric Company, Incorporated. Western Electric Company, Incorporated is a wholly owned subsidiary of American Telephone and Telegraph Company.

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[1] The petition for certiorari does not list all parties to the proceeding in the court of appeals, as required by Rule 21.1(b) of this Court. The names of the Petitioners who were appellants in the court below are: Lorraine A. Amerin; Edward Antonik; Raymond W. Baccus; Stanley C. Black; Walter R. Borchers; Brent D. Braddock; Thomas J. Buckley; Bill R. Cochran; Richard E. Cragg; David Gershberg; William J. Graffy; Adele L. Greb; Walter R. Hajduk; Hubert Hall, Jr.; Alfonso A. Houston; Constantine C. Kokines; William J. Kolberg; Albert G. Komer; Carl Locascio; Frank J. Mortellaro, Jr.; George Musgrove; Howard S. Pack; Emil R. Pawelczyk; Norbert A. Quick; Rudolph H. Reymann; Mary M. Richardson; William M. Seiwert; Galester Sims; Frank D. Solare; Edwin L. Stipley; John M. Strukl; Jack C. Thompson, Jr.; Richard J. Walkowicz; S. J. Wojnicki; and Thomas F. Zurek.

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IN THE

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Teletype Corporation prays that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Seventh Circuit reported at 694 F.2d 497. The unreported memorandum opinion and order of the district court is set forth as Appendix B to the petition.

STATEMENT OF THE CASE

Petitioners' statement of the case is materially inaccurate in certain respects.[2] An accurate factual account is important to demonstrate that this case involves only narrow factual issues of importance solely to the parties, and does not warrant review by this Court.

Concerning their first change of counsel, Petitioners assert that Judge Marshall informed them that they would have three months to secure new counsel after their initial attorney, J. Dale Berry, withdrew in June, 1977 (Pet. at 3, 13). The transcript of proceedings held that day reveals, however, that Judge Marshall allowed Berry to withdraw only after Petitioners so insisted (R.A. 35-39)[3] and that, with respect to securing new counsel, Judge Marshall admonished Petitioner Locascio, "don't let the thing sit, now." (R.A. 40.) Whether Petitioners were correct in assuming, as they now aver for the first time, that they had three months to secure new counsel because the next status call was three months later is not an appropriate issue for resolution by this Court. The same transcript also undercuts Petitioners' current assertion (Pet. at 12-13) that Berry's withdrawal was caused by his desire to modify the terms under which he originally had agreed to represent Petitioners (R.A. 37-38).

Petitioners' assertion that none of them "were ever consulted" about or "agreed" to the two-year representation of them by attorney Carponelli (Pet. at 3) is also contrary to the

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[2] Petitioners' statement of the case also is replete with assertions which have no basis in the record. For example, much of Petitioners' account of their dealings with attorneys Karton, Carponelli and Donnelly is presented for the first time in the petition. Petitioners cannot establish diligence in the district court by offering belated explanations of their conduct to this Court.

[3] Citations to (R.A.) are to the appendix filed by Respondent in the court of appeals. Petitioners' appendix in that court is cited as (P.A.).

record. Petitioner Locascio was present in court when Carponelli formally appeared as his attorney, but voiced no protest (R.A. 53-54, 63). Moreover, attorney Karton's later motion to withdraw stated that "At the time Mr. Carponelli was engaged as trial counsel in June 1979, Mr. Karton had informed Plaintiff Locascio, and a small committee of six or seven who were in contact with the larger group, that he was having trouble with his vision and other health problems, and considered it essential to the protection of the interests of all Plaintiffs to engage additional counsel." (P.A. 18.) Karton's motion also contradicts Petitioners' current implication that, at least through May 19, 1981, they expected that Karton would act as their trial attorney (Pet. at 7).

Although Petitioners claim that the district judge should have required Karton to try the case in June of 1981, Petitioners ignore both their April 14, 1981 letter (R.A. 10) to the judge noting that "Our attorneys do not feel that they can represent us fairly" and requesting "an extension of time, so that we may solicit the services of another attorney," and the in-chambers statements by Petitioners in late April which led Judge Getzendanner to point out that "based on statements made by you, Mr. Locasio, it is quite clear that Mr. Karton was not considered appropriate trial counsel in this case." (P.A. 71.)

The petition contains numerous additional statements which do not enjoy record support or which distort the record. Although the petition stresses that Judge Getzendanner doubted whether Petitioners could obtain substitute counsel quickly (Pet. at 15-16), it neglects to mention that Petitioners disagreed and predicted that they would be able to find new counsel (Pet. at 7a). An exhaustive catalogue of all such misleading statements in the petition will not be set forth here. We merely note that a case which involves primarily the issue of what inferences are to be drawn from undisputed facts is not an appropriate case for review by this Court.

REASONS FOR DENYING CERTIORARI

I.

THE PETITION PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR GRANTING CERTIORARI.

Petitioners plainly seek this Court's review because they believe the district court drew the wrong conclusions from the facts before it. The petition does not assert that the court of appeals decision is inconsistent with either the decisions of this Court or those of any other circuit. Indeed, Petitioners' formulation of the question presented for review imputes no errors whatever to the court of appeals. Petitioners do not raise any question of federal constitutional or statutory law, nor do they raise any question of judicial power under the Federal Rules of Civil Procedure on which this Court has not already ruled in *Link v. Wabash Railroad,* 370 U.S. 626 (1962), or *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976).

Neither the authority of the district court to dismiss this case under Rule 41(b) of the Federal Rules of Civil Procedure nor its discretion under that rule to impose the sanction of dismissal in appropriate circumstances is at issue here. This case concerns only the question of whether or not the district court abused its discretion by concluding, on the basis of the record before it and its conversations with the parties,[4] that dismissal was appropriate. That issue already has been briefed, argued and decided in the district court and in the court of appeals. The petition here is only a capsulized version of Petitioners' brief to the court of appeals. Petitioners did not file either a motion to reconsider in the district court or a motion for an *en banc* rehearing by the court of appeals. Instead,

[4] As the district court's opinion reveals, the decision to dismiss was based in part on certain in-chambers conferences of which no transcript was made.

Petitioners now ask this Court to perform the review process normally contemplated by such motions. In short, none of the reasons for granting review on writ of certiorari set forth in Rule 17 of this Court are present here. This Court therefore should deny certiorari.

II.

THE PETITION RAISES PRIMARILY NONRECURRING FACTUAL ISSUES IMPORTANT ONLY TO THE LITIGANTS.

This Court should deny certiorari for the further reason that the petition raises no issues of general application. The questions presented for review in the petition are so narrowly focused and so factual in character that their resolution by this Court will offer no guidance whatever to other litigants.

In such circumstances review is properly denied. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). This Court more recently explained that "the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari." *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 226 n. 2 (1975).

Assuming that Petitioners are correct in their assertion (Pet. at 21) that, given the facts before it, the district court "could have easily imposed" a different sanction, review still is not warranted. The court of appeals correctly applied the principle that an appellate court "cannot substitute its judgment for that of the trial court simply because it might have acted differently in the trial judge's place." (Pet. at 4a). As this Court has explained "The question, of course, is not whether this Court ... would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so

doing." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). *See also Link v. Wabash Railroad*, 370 U.S. 626, 633 noting that "Whether such an order can stand . . . depends . . . on whether it was within the permissible range of the court's discretion." The court of appeals already has held that there was an adequate basis in the record for the district court's order of dismissal (Pet. at 4a). With respect to such factual review and analysis, the rulings of the courts below are entitled to great weight.

The petition itself reveals that the reasoning of the cases just cited applies to this case, for the petition plainly invites this Court to determine:

(i) whether the lapse of time between Berry's withdrawal and Karton's entrance can "be characterized as serious procrastination on the part of Petitioner" (Pet. at 13);

(ii) who was responsible for Carponelli's withdrawal (Pet. at 13-14);

(iii) whether Petitioners had ratified Carponelli's representation of their claims (Pet. at 18);

(iv) whether Petitioners reasonably believed that Karton would try the case after Carponelli withdrew (Pet. at 17); and

(v) whether the disciplinary charges Petitioners filed against Karton were an additional act of delay (Pet. at 14).

Resolution of such factual issues by this Court could not possibly be of importance to any but the present litigants. Certiorari therefore should be denied.

III.

THE DISTRICT COURT'S INVOLUNTARY DISMISSAL OF PETITIONERS' CLAIMS WAS NOT AN ABUSE OF DISCRETION.

Although Petitioners repeatedly assert that the district court abused its discretion, they do not cite a single case involving similar facts in which dismissal was held to constitute an abuse of discretion. Similarly, although Petitioners argue that the district court should have granted them a further trial continuance beyond the one-week continuance which was granted, that argument also is unsupported by citation to any case holding that a refusal to grant such a continuance was an abuse of discretion.[5]

As the two courts below found, Petitioners did indeed exhibit a lack of diligence in prosecuting their case. Their problems in securing new counsel in May and June of 1981 were not isolated events, but were part of a continuing pattern of repeated changes of counsel. Their first attorney's withdrawal occurred after Petitioners wrote Judge Marshall a letter which caused him to conclude that Petitioners were discontented with the attorney (R.A. 37). Attorney Carponelli withdrew after his transmission of Judge Getzendanner's January, 1981 suggestion that the parties consider arbitration ruptured his working relationship with Petitioners (Pet. at 4-5). Attorney Karton withdrew because Petitioner Locascio was a "runaway client" (P.A. 68-69) who had complained in April to Judge Getzendanner about him (P.A. 71) and in May had filed disciplinary charges against him (P.A. 67).

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[5] Petitioners do not even attempt to demonstrate that the authorities on which the district court based its dismissal order were distinguishable or erroneously decided. Those decisions, *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973), and *Hernandez v. United States*, 465 F. Supp. 1071 (D. Kan. 1979), are factually apposite and consistent with this Court's ruling in *Link* v. *Wabash Railroad*, 370 U.S. 626 (1962).

As is apparent from the petition (Pet. at 4-5), the problems between Petitioners and Carponelli surfaced sometime between January 5 and February 24, 1981. Thus, Petitioners had at least three months, and perhaps almost five months, to secure substitute counsel. In that entire time, the thirty-five Petitioners allegedly contacted a total of only three attorneys.[6] Indeed, between May 14, 1981, when Respondent moved to dismiss, and June 8, Petitioners apparently failed to telephone even one attorney to attempt to secure substitute counsel (Pet. at 3a). Those facts justified the district court's conclusion that Petitioners had not been diligent in prosecuting their case in the face of an imminent trial date.

Neither did the district court abuse its discretion by refusing to find that Rossiello's last-minute appearance and professions of eagerness to go to trial cured Petitioners' earlier lack of diligence in prosecution. For several reasons, this contention, Petitioners' so-called "cure" argument (Pet. at 17-18), is without merit. First of all, this Court should decline to reach the legal issue, given the state of the record with respect to the diligence shown by Rossiello. Thus, the court of appeals noted that "the attorney who serendipitously stepped in at the *twelfth* hour . . . failed to appear in time for his own motion call to set a new trial date." (Pet. at 3a; emphasis in original.) Moreover, as the district court noted when his renewed motion was heard a week later, that attorney had had recurring problems meeting time limits in other cases and appeared unfamiliar with the facts of this case at the same time he was professing his eagerness to try it (P.A. 93, 96).

Second, Petitioners' "cure" argument is inconsistent with this Court's observation in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), that sanctions for delay in a particular case are imposed in part to deter dilatory conduct by other litigants in other cases.

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[6] One of the three attorneys allegedly contacted, a Mr. Scheffler of Jenner & Block, apparently does not exist (P.A. 74).

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

Id. at 643 (emphasis in original). Because it ignores the deterrence function served by sanctions for delay, Petitioners' "cure" argument has been rejected by various courts. *See Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979); *Sheaffer v. Warehouse Employees Union, Local 730*, 408 F.2d 204, 205 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 934 (1969).[7] Thus, the district court's refusal to find that Rossiello's fortuitous appearance and professions of diligence mooted his clients' earlier failures to prosecute was not erroneous.

Petitioners' apparent argument (Pet. at i, 20) that the district court abused its discretion by not conducting a hearing to allow them to rebut Respondent's claims of prejudice is both irrelevant and unsupported by any authority. As the lower

[7] The authority on which Petitioners' "cure" argument is principally based, *Marks v. San Francisco Real Estate Board*, 627 F.2d 947, 948 (9th Cir. 1980), is not in conflict with the cited cases. *Marks* turns on the fact that the plaintiff there had "been assiduous in his prosecution," not on a doctrine that subsequent professions of diligence necessarily moot earlier delays. Acceptance of Petitioners' "cure" argument would allow an egregiously dilatory litigant to avoid dismissal simply by promising to reform, thereby crippling the effectiveness of Rule 41(b).

courts' opinions reveal, the extent and degree of prejudice to Respondent by Petitioners' dilatory conduct were not critical factors in either the district court's dismissal of Petitioners' claims or in the Seventh Circuit's affirmance of that dismissal. Petitioners therefore suffered no injury as a result of the district court's refusal to accord them an opportunity to rebut Respondent's claims of prejudice. In any event, Petitioners never sought such a hearing in the district court.

Petitioners cite no authority for the proposition that they had a right to a hearing the denial of which they now protest. Given this Court's holding in *Link v. Wabash Railroad*, 370 U.S. 626, 632 (1962), that no hearing prior to dismissal is required in circumstances where knowledge of the consequences of delay reasonably may be attributed to the dilatory party, Petitioners' claim of entitlement to a hearing on the issue of prejudice lacks merit. *See also Colokathis v. Wentworth-Douglass Hospital*, 693 F.2d 7, 10 (1st Cir. 1982).

Neither do Petitioners establish an abuse of discretion by asserting (Pet. at i, 19) that the district court failed to balance the prejudice to Respondent and the nature of Petitioners' conduct against the public policy favoring trials on the merits. Presumably, Petitioners' argument is that the district court should have recited explicitly that it engaged in such a balancing process, for there is no basis in the record for assuming that the district court's deliberations did not include these factors. In any event, neither *Link v. Wabash Railroad* nor *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976), require that such an explicit recitation be made.

Petitioners also argue that the district court should have imposed a lesser sanction than dismissal (Pet. at 21). That argument also is unsupported by any authority holding that, in circumstances similar to those here, the failure to impose lesser

sanctions is an abuse of discretion.[8] Nor is that argument accompanied by any precise explanation of what lesser sanction should have been imposed. The argument that the district court "could have" granted Petitioners additional time or required a "pro se"[9] trial falls irresponsibly short of establishing that some lesser sanction would have effectively prevented further delays.

Petitioners' lesser sanctions argument also glosses over the fact, as the Seventh Circuit noted (Pet. at 4a), that the district court did impose a lesser sanction, a warning that dismissal was imminent should Petitioners fail to demonstrate diligence. Thus, because it depends upon a distortion of the record and citation to inapposite authorities, Petitioners' lesser sanctions argument does not merit review by this Court.

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[8] *Schenck v. Bear Stearns & Co.*, 583 F.2d 58 (2d Cir. 1978), involved a dismissal when the case was but thirteen months old, not five years as here. Further, unlike *Schenck*, Petitioners here had been warned that dismissal was imminent and had failed to comply with an order to have the case ready for trial at a specified time. *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976), is distinguishable from this case because, as the Eighth Circuit plainly noted, *id.* at 1193, the delays there were attributable to the attorney and not, as here, to the litigants. *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382 (5th Cir. 1978), is also distinguishable because it involved the dismissal without warning of a four-month old action where all of the delay was attributable to the attorney.

[9] This argument also is disingenuous in light of the complete failure of Petitioners to respond to the district court's inquiry as to whether they wanted "pro se" trials (Pet. at 3a).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TELETYPE CORPORATION

GERALD D. SKONING
Counsel of Record

WALTER P. LOOMIS, JR.
CARL E. JOHNSON
Attorneys for Respondent

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

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